Nos. 1172 - 1174

Supreme Court of the United States

OCTOBER TERM—1946

HARRY R. AMOTT, JESSE L. SHEPHERD, FRANCIS E. SMITH and HUBERT F. YOUNG, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and

J. DONALD DUNCAN, Trustee of Equitable Office Building Corporation, Debtor in Reorganization Proceedings under Chapter X of the Bankruptcy Act,

Petitioners,

against

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."), Debtor, and

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of Equitable Office Building Corporation,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND SUPPORTING BRIEF

March 27, 1947

FRANK R. BRUCE,
of Scribner & Miller,
Attorneys for Harry R. Amott, *et al.*, Petitioners,
40 Wall Street,
New York City.

HENRY S. HOOKER,
Attorney for J. Donald Duncan, Trustee, Petitioner,
50 Broadway,
New York City.

The undersigned have joined in the within petition for writs of certiorari:

T. FERGUS REDMOND,
Attorney for Empire Trust Company,
Indenture Trustee for the Debenture Holders,
120 Broadway, New York City.

SIDNEY R. NUSSENFELD,
Attorney for the Granger Committee of Debenture Holders,
120 Broadway, New York City.

W. RANDOLPH MONTGOMERY,
Attorney for Wertheim & Co., *et al.*, Debenture Holders,
1 Wall Street, New York City.

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STATUTES

Supreme Court of the United States

OCTOBER TERM—1946

HARRY R. AMOTT, JESSE L. SHEPHERD, FRANCIS E. SMITH and HUBERT F. YOUNG, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Harry R. Amott, Jesse L. Shepherd, Francis E. Smith and Hubert F. Young, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and J. Donald Duncan, as Trustee of Equitable Office Building Corporation, Debtor in reorganization proceedings under Chapter X of the Bankruptcy Act, respectfully pray that writs of certiorari issue under Section 24(c) of the Bankruptcy Act (11 U. S. C. A. § 47(c)) and Section 240(a) of the Judicial Code (28 U. S. C. A. § 347(a)) to review the judgments of the

United States Circuit Court of Appeals for the Second Circuit dated December 31, 1946 and January 28, 1947, respectively, and an ancillary order of that Court dated January 28, 1947 (R. 438).

A certified copy of the pertinent portions of the records in the instant proceedings, including the proceedings in said Circuit Court of Appeals, has been furnished in accordance with Rule 38, Par. 1 of the Rules of this Court.

Opinions

Opinions have been rendered in these proceedings by the District Court and by the Circuit Court of Appeals for the Second Circuit and have been included at pages 99, 427 and 437, respectively, in the record of the proceedings furnished to this Court. The main opinion of the Circuit Court under the title of *Knight et al.* v. *Wertheim & Co. et al.*, is reported in 158 F. 2d 838. The *per curiam* opinion of the Circuit Court under the title of *Charles A. Dana et al.* v. *Wertheim & Co. et al.*, is reported in 158 F. 2d 982.

Mr. Justice Reed of this Court rendered an opinion (R. 362) in connection with his order dated August 6, 1946 (R. 360) granting to the above-named respondents in cases 609, 610 and 612 (October Term 1946) a stay of consummation of the confirmed plan of reorganization "until this Court determines whether a writ of certiorari shall be granted herein, and, if such writ be granted, pending the further order or the final disposition of this cause by this Court".

This Court on November 25, 1946 rendered a partial decision on the petitions of the respondents for writs of certiorari in cases 609 and 610 as follows:

> "So much of the respective petitions for certiorari in these cases as asks for a writ to review the order of the United States District Court for the Southern District of New York is denied."

However, there remain undetermined in this Court the remainder of the petitions of the respondents in cases 609 and 610, and the whole of the petition of the respondents in case 612 for writs of certiorari to review the orders of the Circuit Court of Appeals for the Second Circuit, which, on July 18 and 31, 1946 denied to the respondents a stay of the consummation of the confirmed plan of reorganization.

The stay of consummation of the confirmed plan of reorganization, granted by Mr. Justice Reed on August 6, 1946, is still outstanding and effective pending action of this Court upon the petitions (609, 610 and 612) of the three sets of respondents above named.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(c) of the Bankruptcy Act (11 U. S. C. A. § 47(c)), and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347 (a)).

Statutes Involved

The pertinent provisions of the Bankruptcy Act, as amended, are found in the appendix to this petition.

Statement

The debtor corporation is the owner of a large office building in lower Manhattan, known as the Equitable Building (R. 427). On April 10, 1941 the debtor filed a petition for reorganization under Chapter X of the Bankruptcy Act, and the District Court approved the petition on the day it was filed (R. 1).

On February 24, 1944, the Trustee filed a proposed plan of reorganization. The Trustee filed amendments to his plan on February 5, 1945. The Trustee on March 9, 1945 filed an amended plan of reorganization, and on May 11, 1945 he filed another amendment of the plan. On June 29, 1945 the Trustee filed amendments to his plan. On October 5, 1945 the common stockholders' and debenture holders' committees jointly filed amendments to said plan. On November 16, 1945 the Trustee filed further amendments to the plan (R. 175-176).

Prior to the approval of the plan by the District Court, extensive hearings were conducted on the valuation of the property. Fifteen hearings were held before the Court with 854 pages of testimony and 48 exhibits.

The independent real estate appraiser employed by the Trustee, pursuant to Court order, to appraise the property in the reorganization proceedings placed a value on the land and building of $20,000,000 (R. 287). The appraiser employed by the common stockholders' committee stated the value should be $23,500,000 (R. 292). On November 16, 1945 the Securities and Exchange Commission stated in Court through its representatives that the $20,000,000 valuation by the independent appraiser was an "optimistic high" (R. 322).

The representative of the Securities and Exchange Commission reported to the Court that the Commission considered the reorganization plan unfair because it allows the common stockholders to participate in the plan, in view of the fact that in the Commission's opinion the value of the property does not exceed the debts of the Corporation and, consequently, there is no equity for the stockholders (R. 233).

The District Court determined that the value of the land and building was $21,375,000, or $1,375,000 in excess of the maximum value urged by the Commission; and that the value of the debtor's other assets was $1,205,-761.17, making a total of $22,580,761.17; and allowed to the

stockholders a participation in the stock of the reorganized company (R. 177).

On December 4, 1945 the District Court approved the Trustee's plan as amended (R. 175). The plan was thereupon submitted to the security holders for their vote. Of those qualified to vote, 84% of the stockholders, 99% of the debenture holders, and 100% of the second mortgage bondholders, voted in favor of it (R. 244-247).

On May 13, 1946 the District Court confirmed the plan, with the approval of all interested parties, including the common stockholders' committee, which had actively participated in the proceeding throughout (R. 261). No appeal was ever taken from such order of confirmation.

On June 7, 1946 the Court entered an order appointing Empire Trust Company as Trustee under the new second mortgage indenture provided for under the plan. On June 24, 1946 the Court entered an order approving documents in consummation of the plan, and directing the Trustee to execute and file a certificate of incorporation of the new company, and to take the steps required to qualify the new company to do business in New York (R. 268).

On July 8, 1946 the District Court entered a formal order of consummation of the plan of reorganization. This order fixed the effective date of the consummation of the plan of reorganization at July 1, 1946 (R. 273).

Confirmed Plan of Reorganization

The debtor's capitalization consists of the following (R. 427):

First Mortgage	$15,880,543.35
Second Mortgage Bonds	3,000.00
Debentures	4,754,000.00
Accrued interest on Debentures to January 1, 1947	1,188,500.00
Common Stock	862,098 shares

Under the confirmed plan of reorganization, the treatment of the security holders is as follows (R. 181):

(a) The first mortgage is to be undisturbed.

(b) The second mortgage bonds are to be paid in cash.

(c) The $4,754,000 of debentures are to receive:

1. $2,852,400, or 60% of principal, in new 5% income bonds convertible for a period of three years into 456,384 shares of common stock and for two years thereafter into 285,240 shares (conversion price being about $6.25 per share for the first period and $10 per share for the later period), and

2. 475,400 shares of common stock, being 100 shares for each $1,000 debenture.

(d) The common stock will receive one share of new common stock for each 10 shares of old, or a total of 86,210 shares of new stock.

The total amount of principal and accrued interest due on the debentures (as of January 1, 1947) is $5,942,500, or $1,250 for each $1,000 debenture. The portion of the claim of each $1,000 debenture and accrued interest which is not being satisfied by the issuance of each $600 principal amount of new bonds, is about $650, for which there will be issued 100 shares of new stock. This assumes a reorganization value for the new stock of about $6.50 per share.

Under the confirmed plan, no part of the existing working capital of the debtor is being depleted to satisfy the outstanding debentures.

Substantial Consummation of Confirmed Plan

After the order of confirmation, the following acts were done under the order of the Court to consummate the plan (R. 29):

(a) A new corporation was organized under the laws of the State of Maryland;

(b) The incorporators met and adopted the necessary resolutions to put the corporation in business;

(c) The new Board of Directors, approved by the Court (R. 266), met on several occasions, assumed de facto control of the property and assets of the debtor, designated officers who were approved by the Court and took all steps necessary to facilitate the business of the corporation;

(d) A listing application was made to the New York Stock Exchange to list the new stock of the corporation. This application was granted subject to transfer of the properties;

(e) The new corporation applied for and obtained permission to do business in New York;

(f) A Trustee under the New Second Mortgage was appointed by the Court;

(g) The New Corporation retained, with Court approval, a transfer agent and registrar of the stock of the New Company;

(h) The New Indenture had been drawn and application to qualify it had been filed with the Securities and Exchange Commission, and no deficiency letter was received within the statutory time period, and the Indenture became qualified;

(i) The new securities of the New Company had been prepared and were ready for delivery to the security holders of the debtor;

(j) All documents to carry out the plan had been drawn and approved by the Court and by all parties in interest;

(k) On July 8, 1946 the Court below signed the order of consummation (R. 273) in which it fixed the effective date of the plan as July 1, 1946 (R. 274);

(l) By the order of consummation the Court below fixed the amount of cash to be turned over to the New Company (R. 278) cancelled defaults and arrears against the debtor prior to July 1, 1946 (R. 278); directed the transfer of the debtor's property to the New Company and authorized and directed the respective parties to sign and deliver a deed, bill of sale, mortgage and any and all documents necessary to consummate the plan (R. 279).

All documents had been prepared and were ready for signature and delivery at the time of respondents' applications. There remained merely the ministerial act of signing and delivering three documents,—documents which the Court had directed to be signed and delivered merely to clear the record title to the real estate.

The plan had in effect been consummated.

New Proposal by the Stockholders and the Debtor

After the expiration of the time to appeal from the order of confirmation, and after substantial consummation of the confirmed plan as above indicated, the stockholders and the debtor, the respondents above named, filed a series of petitions in the District Court for leave (a) to modify the confirmed plan of reorganization, (b) to vacate the order of confirmation, (c) to vacate the order of consummation of the plan, and (d) to dismiss the proceeding. The said petitions contained no allegations of any change in the value of the debtor's property or of any mistake, inadvertence, surprise or excusable neglect. The District Court, after full hearings on two days, entered orders denying these applications on July 16 and July 31, 1946, respectively.

The new proposal of the stockholders and the debtor (R. 429) would treat the security holders as follows: For each 10 shares of old common stock, there would be issued one new share, as under the confirmed plan. In order to raise funds to satisfy in full the claims of the debenture holders, it is proposed that:

1. The stockholders be given the right for each share of existing stock to subscribe to a total of 862,094 new shares of stock at $6 per share, which would raise $5,172,588, and

2. The balance of $769,912 would be taken from the treasury of the debtor corporation.

The offer to stockholders at $6 per share was to be underwritten by City Investing Company, a corporation engaged in owning and managing real estate, which would receive as a bonus 69,686 shares of new common stock. With the money thus raised, the debentures would be paid in cash.

Thus there would be taken from the debenture holders the stock allocated to them, presently and upon conversion, under the confirmed plan of reorganization, so that such stock could be offered to the stockholders under the proposed underwriting plan. If the stockholders did not subscribe to this stock, then City Investing Company would become the owner of 862,094 shares at $6 a share, and would in any event receive as a bonus 69,686 shares.

The underwriting commitment, which was the basis of the proposed plan, was subject to many conditions and was limited to a period of ninety days which expired on October 15, 1946. The underwriting lapsed prior to the time the appeals were heard by the Circuit Court of Appeals and has not been renewed, and at the present time there is no semblance of a commitment either by City Investing Company or anyone else.

The stockholders and the debtor appealed to the Circuit Court of Appeals for the Second Circuit from the orders of the District Court denying their applications. The Circuit Court, by judgments entered December 31, 1946

and January 28, 1947, respectively, and by ancillary order entered January 28, 1947, reversed the District Court. The decisions of the Circuit Court direct the following (R. 435):

> "Upon remand the question will be whether the City Investing Company—or for that matter any other equally responsible underwriter—will within a reasonable time come forward with a reliable and practical offer which will produce enough money to pay off the debenture bonds, principal and interest. If such an offer is forthcoming, it should be treated as a permissible 'alteration' or 'modification' of the plan under § 222, and the judge should 'approve' it, provided he finds that it satisfies the conditions we have just mentioned."
>
> (*Knight et al.* v. *Wertheim et al.*, 158 F. 2d 838; at p. 844.)

The Effect of the New Proposal Upon the Essential Working Capital and Reserves of the New Company

The confirmed plan provides that the cash on hand at consummation shall be utilized, after administration and operating expenses, for the following purposes:

Working capital	$225,000
Reserve Fund for capital improvements	250,000
Reserve Fund to assure against possible foreclosure of the first mortgage	750,000
Total working capital and reserves	$1,225,000

All parties including the Trustee and the Securities and Exchange Commission considered these items essential to the preservation of the property and continuance of the business of the reorganized company. The working capital is moderate indeed. The improvement fund is essential for a building thirty years old in order to maintain the

building properly and to meet competition of newer structures. The reserve fund is vital in order to insure that the company will be able to pay $992,000 each year to the first mortgagee as the required interest and amortization, and thus avoid foreclosure of the first mortgage. During the years 1941, 1942, 1943 and 1944 the Trustee protected himself from default under the first mortgage only because of the provisions of the New York State Mortgage Moratorium Law.

The proposed plan would divert $769,912 cash from the working capital and reserve funds of the reorganized company, and there would be a danger of default under the first mortgage, as the result of which all stockholders would be foreclosed and eliminated.

Counsel for the Securities and Exchange Commission recognized the advantages in the reserve funds provided for under the confirmed plan. He stated:

> "There are other provisions in the plan [the confirmed plan] * * * which are aimed to protect the investment of the debenture holders by reducing the funded debt and rehabilitating the building as fast as may be possible" (R. 309).
>
> "However, the mortgage is owned by the Equitable Life Assurance Society, and they have insisted upon their pound of flesh, and under the law there is no way that that mortgage can be reduced except by the application of earnings to the reduction of its principal. And that Mr. Duncan [the Trustee] has attempted to insure by the cautionary provision in his plan of reorganization" (R. 319).

The Trustee, who had to rely upon the New York Moratorium Law to avoid the consequences of default for the four year period from 1941 to 1944, has recognized the dangers to the reorganized company if it is stripped of essential working capital and reserve funds. He stated:

> "In the fiscal years of the Corporation for 1943 and 1944 the Corporation did not earn the amount of the interest and required yearly amortization of that

> mortgage. The amount required to be paid each year until the mortgage is completely paid is an aggregate of $992,000 (approximately $1,000,000) including interest and amortization. I have endeavored to obtain a change in the terms of the mortgage but have been unsuccessful. The Assurance Society has refused to reduce the interest rate or change the amount of amortization" (R. 231).

The District Court, in discussing the new proposal, recognized the importance to the reorganized company of being in a strong financial position, saying:

> "I should be greatly distressed if a plan such as is suggested here were to go through, and then ultimately for it to develop that a loan would be required to take care of the necessities of the corporation, which might result then in allowing all the stock publicly held to be wiped out" (R. 98).

The Court further stated that it could not consider the proposed plan

> "unless I have assurance that the mortgage debt can be taken care of in full plus all these other expenses and obligations, and the proposal of the underwriters will have to include that, and they will have to take a chance as to what my discretion may be on making allowances" (R. 68).

Notwithstanding the above views expressed by the Court, counsel for the Securities and Exchange Commission, and the Trustee, neither the underwriter nor the above-named respondents made any effort to have the proposed plan provide for the essential working capital and reserve funds.

Despite the foregoing, the Circuit Court of Appeals in reversing the District Court stated in 158 F. 2d 838, at page 844:

> "The amount of cash which would be left to carry on was necessarily speculative; but the prospect was undoubtedly of a much smaller margin than had been the company's habit in the past; perhaps it was so small that a majority of the shareholders would have

preferred to take 10 per cent of their holdings, and let the option go. That was, however, not a question for the debenture holders or for the trustee; indeed, it was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage; and if they chose to do so, the judge would not have been justified in interfering in their choice; it was a practical decision within the powers of the majority; Chapter X does not give to the bankruptcy court any larger supervision in such a situation than if the new company had been set up and sent upon its way."

The Nature of the Underwriting under the New Proposal

Under the purported underwriting agreement there was no obligation to purchase any of the shares unless, within 90 days, *i. e.*, prior to October 15, 1946, the proposed plan was finally confirmed, consummated by the transfer of the properties, any rights to appeal had expired or any appeals been disposed of, and the new stock offered to the stockholders and delivered to the underwriter to the extent unsubscribed by the stockholders, together with 69,686 shares of free stock (R. 156). It is clear that a period of time much longer than 90 days would be necessary before such conditions could be complied with. In order to consummate any newly proposed plan it will be necessary to take the many steps already considered, including a hearing on the merits, a further notice to security holders, reference to the Securities and Exchange Commission, approval by the Court, submission to security holders for acceptance, and a hearing on confirmation. Obviously, any commitment for ninety days was, as a practical matter, an empty gesture. It is believed that nothing less than a commitment for an indefinite period until the final determination of the proceedings would have constituted a real commitment.

Questions Presented

1. After the plan had been confirmed under Chapter X of the Bankruptcy Act and, no appeal having been taken, the plan had been substantially consummated, could such plan be changed without the consent of the debenture holders, to eliminate the provision that debentures shall be satisfied in stock and income bonds convertible into stock, and substitute therefor a new proposal for payment of the debentures in cash partly out of the treasury of the corporation and partly by offering to the stockholders, under an underwriting arrangement, the stock previously allotted to the debentures?

2. Was the District Court required to approve such new proposal and direct its submission to a vote of the stockholders, without regard to the fact that the confirmed plan was substantially consummated, and without regard to the feasibility of the new proposal in view of the limited time and other conditions of the underwriting and the doubt that it would provide sufficient funds to pay off the debentures without stripping the reorganized company of quick assets necessary to carry on its business?

3. Was it an abuse of discretion by the District Court to refuse to reopen the reorganization proceedings upon the submission of such limited and conditioned underwriting, after the expiration of the time to appeal from the order confirming the plan and after substantial consummation of the plan, and in view of the other record facts in the case?

4. Was the Circuit Court of Appeals in error in holding that the question of fairness and feasibility of such new proposal was exclusively for determination by a majority of the stockholders, and of no concern to the District Court?

5. Did the Circuit Court of Appeals err in refusing to dismiss the appeals from the orders of the District Court and in reversing such orders, where it appeared prior to argument of the appeals that the underwriting offer, on which the proposed changes in the confirmed plan were predicated, had expired, and there was no showing that such underwriting offer would be renewed, or that any similar offer might be obtained?*

6. Were the petitions by the stockholders and the debtor in reality requests for rehearings so that the orders denying the same were not appealable to the Circuit Court of Appeals?

Reasons for Granting the Writs

It is submitted that this Court should grant the writs of certiorari herein for the following reasons:

1. The Circuit Court of Appeals has decided important questions arising under Chapter X of the Bankruptcy Act which have not been, but should be, settled by this Court. Among these questions are:

(a) The effect of confirmation of a plan of reorganization as fixing the rights of security holders.

(b) The circumstances under which a plan after confirmation and substantial consummation, may be altered or modified under Section 222 of the Bankruptcy Act.

(c) The function of the reorganization court to pass upon the fairness, equitableness and feasibility of pro-

* Under date of November 9, 1946 the petitioners filed with this Court a suggestion of mootness and urged that the petitions for writs of certiorari filed by the above-named respondents with this Court (609, 610 and 612—October Term 1946) should be denied and the stay granted by Mr. Justice Reed August 6, 1946 should be vacated upon the ground that the questions presented to this Court upon such petitions are purely hypothetical, in view of the absence of any underwriting commitment to support the new proposal.

posed changes in a confirmed plan of reorganization before submission of these changes to a vote of the security holders.

(d) The right of a debtor and its stockholders, after confirmation and substantial consummation of a plan, to substitute a proposed new plan for payment of creditors, in lieu of the securities allotted to them under the confirmed plan.

Under date of August 6, 1946 Mr. Justice Reed of this Court entered an order staying the consummation of the confirmed plan of reorganization herein, pending determination by this Court of three petitions for writs of certiorari filed by the respondents above named (Nos. 609, 610 and 612—October Term 1946), which stay is still in full force and effect. These petitions for writs of certiorari are still pending, in part undetermined, in this Court. The opinion of Mr. Justice Reed in connection with the granting of such stay projected a number of questions, including those above mentioned, which he stated required final determination. Reference is made to this opinion printed at page 362 of the record herein. An early authoritative decision of these questions by this Court is of great importance, not only to the parties to this proceeding and to the hundreds of holders of securities of the debtor, but also to the numerous other debtors which are presently in proceedings under Chapter X, to the holders of their securities, to United States District Courts in the supervision of such proceedings and the administration of the Bankruptcy Act, and to the Securities and Exchange Commission in the conduct of the functions with which it is charged under Chapter X of said Act.

2. The Circuit Court of Appeals has decided the question of the extent to which a plan, after confirmation, may be changed under the provisions of Chapter X of the Bankruptcy Act, in a way probably in conflict with applicable decisions of this Court. Heretofore, this Court has declined to reopen a confirmed plan of reorganization, on the

basis of alleged changed circumstances, in a full opinion rendered February 3, 1947 in the case entitled *Insurance Group Committee* v. *Denver and Rio Grande Western Railroad Company,* No. 690—October Term 1946, 91 Law Ed., 436. Quite recently, this Court has denied certiorari to review plans of reorganization affecting St. Louis-San Francisco Railway Co., Chicago, Rock Island and Pacific Railway Company and St. Louis Southwestern Railway Company; in which cases reopening of the plans was sought upon the ground of alleged changed circumstances and increased earnings since the approval of the plan involved therein.

3. The Circuit Court of Appeals for the Second Circuit has rendered a decision in this case which is in apparent conflict with decisions of the same and other Circuit Courts of Appeals on the same matter. This pertains particularly to the interpretation given by the Circuit Courts of Appeals under Section 222 of the Bankruptcy Act and under former Section 77B (f). In *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (C. C. A. 2nd, 1944), the Second Circuit held that the appellant's proposals did not in effect constitute modifications of the approved plan, but clearly constituted a newly proposed plan, which could not be considered after approval of the Trustee's plan. In *Diversey Building Corp.* v. *Metropolitan Trust Company,* 141 F. 2d 65 (C. C. A. 7th, 1944), the Seventh Circuit interpreted subdivision (f) of Section 77B of the Bankruptcy Act to mean such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation. In *Rogers* v. *Consolidated Rock Products Co.,* 114 F. 2d 108, 111 (C. C. A. 9th, 1940) the Court said that a proposal of an alternative plan after the entry of an order confirming a plan came after "all reasonable time for such proposals of alternative plans had long expired". The First Circuit Court reached a similar conclusion in *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.,* 81 F. 2d 314 (C. C. A. 1st, 1936).

The Circuit Court in this case denied any degree of finality to the order of confirmation, holding that a confirmed plan may be altered or modified at any time before final decree discharging the Trustee and closing the estate (often necessarily delayed for a year or two after consummation of the plan in order to complete actions or proceedings pending in the name of or against the Trustee). The Circuit Court stated that such alteration or modification (R. 431):

> "must be to some extent congruent with the plan. We cannot, however, agree that there are narrower or more definite limits than this."

The result of this holding of the Circuit Court is to cast a cloud upon all securities issued upon consummation of a plan, and to render transactions in such new securities uncertain and impractical, until the entry of the final decree.

4. The Circuit Court of Appeals in its decision herein has so far departed from the accepted and usual course of judicial proceedings, and has so far directed such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

(a) The Circuit Court has taken upon itself the exercise of discretion with which the Circuit Court is not invested, and has been impelled to hold that the District Court abused its discretion in the premises, contrary to the weight of the facts and circumstances considered by the District Court. It is a fundamental rule that an exercise of discretion by a District Court will not be disturbed upon appeal except for a clear showing of abuse of discretion. This is an important fundamental rule in the administration of cases by the District Court, particularly in bankruptcy matters.

(b) The judgments of the Circuit Court of Appeals directing the District Court in this case to approve a new proposal, thereby depriving the District Court of

jurisdiction to determine the questions of fairness, equitableness and feasibility of the proposed plan, and to relegate such questions entirely to the vote of the security holders, is in violation of Section 221, subdivision (2) of the Bankruptcy Act. Under that section it has been uniformly held that the determination of these aspects of a plan are exclusively within the jurisdiction of the District Court for the protection of the security holders as a whole.

(c) The Circuit Court of Appeals committed error in denying petitioners' application to dismiss the appeals in that Court upon the ground that they had become moot, since the offer of the underwriter had long since lapsed and there was then in existence no outstanding underwriting. It has been uniformly held in this Court that Appellate Courts should not be permitted to render a declaratory judgment on purely hypothetical questions. This is especially true where the Appellate Court is being requested to render such a declaratory opinion in order to set aside a plan that has been confirmed and practically consummated.

(d) The Circuit Court of Appeals exceeded its power in entering the judgments reversing the decree of the District Court for the purpose of keeping suspended, *in vacuo,* the order of the District Court confirming the plan of reorganization herein, in order to give stockholders an opportunity to cast about for an underwriting upon which to support their new proposal. The Circuit Court was required to pass on the merits of the cause as it came to it upon the record, and the controversy between the parties having lapsed by reason of the expiration of the underwriting, the Circuit Court was required to dismiss the appeals for mootness in the absence of any existing justiciable controversies. It has been uniformly held in this Court that an appeal should not be entertained where it presents no actual controversy involving real or substantial issues.

Conclusion

For the above-named reasons, it is respectfully submitted that certiorari should be granted, directed to the United States Circuit Court of Appeals for the Second Circuit, to review the aforesaid judgments of that Court dated December 31, 1946 and January 28, 1947, respectively, and the ancillary order of that Court dated January 28, 1947.

Dated, March 27, 1947.

FRANK R. BRUCE,
of Scribner & Miller,
Attorneys for Harry R. Amott, *et al.*, Petitioners,
40 Wall Street,
New York City.

HENRY S. HOOKER,
Attorney for J. Donald Duncan,
Trustee, Petitioner,
50 Broadway,
New York City.

The undersigned do hereby join in the foregoing petition for writs of certiorari:

T. FERGUS REDMOND,
Attorney for Empire Trust Company,
Indenture Trustee for the Debenture Holders,
120 Broadway,
New York City.

SIDNEY R. NUSSENFELD,
Attorney for the Granger Committee
of Debenture Holders,
120 Broadway,
New York City.

W. RANDOLPH MONTGOMERY,
Attorney for Wertheim & Co., *et al.*,
Debenture Holders,
1 Wall Street,
New York City.

BRIEF IN SUPPORT OF PETITION

POINT I

The case involves important questions in the construction of Chapter X of the Bankruptcy Act which should be decided by this Court.

The opinion of Mr. Justice Reed in this case, dated August 6, 1946, leaves open the following questions for determination by this Court:

1. "The debenture holders' legal defenses are (1) that the rights of the debenture holders vested on confirmation of the plan, C.X, sec. 224 and (2) that the action of the district court in denying applicants' petitions was within its discretion. See Pewabic Mining Co. v. Mason 145 U. S. 349, 366, 367."

2. "Thus it may be held that confirmation of the plan fixes rights thereunder as between the creditors (debenture holders) and stockholders, subject to review on appeal from the order of confirmation; that the later transfer of the property frees it and the contemporaneous final order terminates stockholders interest in the debtor."

3. "When no fraud or other unfair practices or acts are charged to the beneficiaries of the confirmation, as is the situation in these proceedings, rights acquired by confirmation of a plan may be secure from change unless gross injustice is shown."

4. "It may be determined that present debenture holders carry the risk of profit or loss after confirmation and therefore are entitled to any increased value."

5. "The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization court to protect the interest of junior creditors also has not been judi-

cially determined, finally. Compare R. F. C. v. Denver & R. G. W. R. Co., 90 L. Ed. 1134, 1148; Ecker v. W. P. R. Co., 318 U. S. at 506-509."

6. "I think the stockholders are entitled to have determined the question of power in the district court to grant their petitions, and, if the power exists, the propriety of its exercise under the circumstances alleged or the facts that may be developed on a hearing. Widely shifting values make the issues of general importance in pending reorganizations under Chapter X. This determination can only be obtained after decisions by the Circuit Court of Appeals."

POINT II

The decision of the Circuit Court of Appeals in this case is at variance with the decisions of this Court in analogous situations.

The decisions in this Court in the following cases, where there was a refusal to open up approved plans on the alleged ground of changes in economic conditions and earnings of the various companies involved therein, are in principle at variance with the decision of the Circuit Court of Appeals in the instant case:

Insurance Group Committee v. *Denver and Rio Grande Western Railroad Co.,* No. 690—October Term 1946, 91 Law. Ed. 436;

St. Louis-San Francisco Railway Co. v. *James H. Brewster,* No. 638—October Term 1946, 91 Law. Ed. 76;

Gerald Axelrod v. *Joseph B. Fleming,* No. 791—October Term 1946, 91 Law. Ed. 550; and

St. Louis, Southwestern Railway Company v. *Berryman Henwood,* No. 936—October Term 1946.

POINT III

The decision of the Circuit Court of Appeals in this case is at variance with the decisions of the same and other Circuit Courts of Appeals in analogous situations.

In the cases hereinafter cited, the Circuit Courts of Appeals of the First Circuit, the Second Circuit, the Seventh Circuit and the Ninth Circuit have without exception held that amendments and modifications permissible under Section 222 and under former Section 77B (f) are only "such changes as will better aid in carrying out the plan which has been finally confirmed."

Thus in *Diversey Bldg. Corp.* v. *Metropolitan Trust Co.*, 141 F. 2d 65, 68, the Circuit Court for the 7th Circuit said in a Section 77B proceeding:

> "We cannot accept appellant's interpretation of subsection f of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of a plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision
> * * *
> "We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the court."

In *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (a case under Chapter X, in which the facts were similar to those here involved), the Circuit Court for the 2nd Circuit held that changes which do not aid in carrying out an approved plan, but are so extensive as to constitute a new plan, may not be entertained even before confirmation, and *a fortiori*

may not be made after confirmation and partial consummation, as in the present case. The Court said at page 937:

> "Since there is no similar provision for submission or filing of any other plan subsequent to approval, at least not until ultimate disposition of the approved plan, it follows that the time for offering substitute plans expired with approval of the trustee's plan; and proposals offered thereafter could be only in the nature of a modification of such approved plan. Bankruptcy Act, § 222.
>
> "Appellants' proposals filed by way of objections, however, differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification. In providing for the transfer of the debtor's property to a new corporation, and the extinguishment of a great number of claims in exchange for shares in that corporation, as a substitute for the trustee's proposed outright sale and full cash payment of all the claims, appellants' proposals clearly constituted a newly proposed plan, which could not be offered at this late stage of the proceedings. Downtown Inv. Ass'n v. Boston Metropolitan Bldgs., 1 Cir., 81 F. 2d 314, 321. Upon ascertaining this fact, the District Court was not required to listen to further arguments on the merits of the proposals, and hence committed no error in denying appellants further opportunity to be heard."

In *Rogers* v *Consolidated Rock Products Co*, 114 F. 2d 108, 111 (C. C. A. 9th, 1940) the Court said that a proposal of an alternative plan after the entry of an order confirming a plan came after "all reasonable time for such proposals of alternative plans had long expired." The First Circuit Court reached a similar conclusion in *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.*, 81 F. 2d 314 (C. C. A. 1st, 1936).

POINT IV

Clear error was committed by the Circuit Court of Appeals in several respects which can be corrected only by review of this Court.

As shown in the petition annexed hereto, error was committed by the Circuit Court in the following respects:

(a) The Circuit Court of Appeals held that the changes in the confirmed plan proposed by the stockholders and the debtor constituted a modification within the meaning of Section 222 of the Bankruptcy Act which the District Court in its discretion had the power to approve, and the Circuit Court of Appeals recognized that in refusing to approve such changes the District Court had acted in the exercise of its discretion. The Circuit Court of Appeals then proceeded to hold that the District Court had abused its discretion in the matter. When the opinion of the Circuit Court of Appeals is analyzed, however, it is apparent that the effect of the decision is to leave no field for the exercise of discretion by the District Court, but rather to require it to approve changes of the character proposed herein, whenever requested by the stockholders or the debtor. For example the Circuit Court of Appeals overruled the District Court on the point that the length of time the proceedings had been pending, the deliberations had in arriving at the confirmed plan, and the opportunity given to all parties to be heard in connection therewith, were reasons for denying the application. It also overruled the District Court in deciding that the unfeasibility of the new proposal warranted its rejection by the District Court in its discretion. It also overruled the District Court in its decision that a decree solemnly and deliberately arrived at should not be lightly overthrown or cast aside. All of these matters would seem to be legitimate matters of consideration by the District Court

in the exercise of discretion, and the net result of the Circuit Court of Appeals decision is really to take this matter out of the realm of discretion and to make it mandatory on the District Court to accept any underwriting of like character to that presented in this situation. The decision clearly conflicts with the provisions of Section 222 of the Bankruptcy Act which contemplates that any modification of the confirmed plan must be approved by the District Court before it is submitted to the security holders. There could be no reason for an approval by the District Court unless that Court were to be given some room for exercising discretion in giving or withholding such approval.

It has been uniformly held that amendment of a plan of reorganization is not a matter of right, but is within the sound discretion of the District Court. The Court's granting or denial of petitions for amendment of a plan, like other discretionary powers in bankruptcy, is appealable only for a proven abuse of that discretion.

North American Car Corp. v. *Peerless W. & V. Machine Corp.*, 143 F. 2d 938, 940 (C. C. A. 2nd, 1944);

Hurd Committee v. *Prudence Realization Corp.*, 150 F. 2d 477, 479 (C. C. A. 2nd, 1945); cert. denied, 326 U. S. 734 (1945);

Mohonk Realty Corp. v. *Wise Shoe Stores*, 111 F. 2d 287, 289 (C. C. A. 2nd, 1940); cert. denied, 311 U. S. 654 (1941);

Diversey Bldg. Corp. v. *Metropolitan Trust Co.*, 141 F. 2d 65, 69 (C. C. A. 7th, 1944);

Country Life Apartments v. *Buckley*, 145 F. 2d 935, 937 (C. C. A. 2nd, 1944);

In re Schreiber, 23 F. 2d 428, 430 (C. C. A. 2nd, 1928).

In *Reconstruction Fin. Corp.* v. *Denver & Rio G. W. R. Co.*, 90 Law. Ed. 1134 (1946), the Supreme Court, in reversing a mandate of the Circuit Court of Appeals which had overruled a finding by the District Court that the plan was "fair and equitable", said (p. 1154):

> "In view of the District Judge's familiarity with the reorganization, this finding has especial weight with us. See Rule 52, Federal Rules of Civil Procedure."

See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944).

It is manifest that the District Court clearly exercised its sound discretion, when it decided (R. 99):

> "The deliberate and fully considered adjudication of a responsible court made and entered without objection on the part of any person in interest—and after all parties were afforded ample opportunity to be heard on the merits of the issues involved—and when they and the public—as they had a right to do—confidently relied upon its integrity, should be something more stable than a weather vane on a blustery day in March. For this reason, my consummation order of July 8, 1946, will stand. It follows that the application to reopen the reorganization proceedings of the debtor will be denied."

(b) The Circuit Court took from the District Court and vested in the stockholders the power of the District Court to pass upon the fairness, equitableness and feasibility of the proposed new plan. As pointed out in the accompanying petition, the Circuit Court said with respect to the financial condition of the reorganized company under the proposed new plan and the possibility of its survival after consummation of the newly proposed reorganization:

> "The last question remains; whether the new company would have been so stripped of quick assets that it might prove unable to carry on its business: i. e.,

> that its cash resources would have been at the danger point. * * * That was, however, not a question for the debenture holders or for the trustee; indeed, it was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage; and if they chose to do so, the judge would not have been justified in interfering in their choice; * * *" (*Knight et al.* v. *Wertheim & Co. et al.*, 158 F. 2d 838, 844).

Further, the Circuit Court directed that upon remand, if the City Investing offer is reinstated or any other similar offer made to pay off the debenture bonds, principal and interest,

> "the judge should 'approve' it, provided he finds that it satisfies the conditions we have just mentioned" (p. 844).

The only condition of approval specified in the Circuit Court's opinion is that the new offer should "produce enough money to pay off the debenture bonds, principal and interest". The Circuit Court deprives the District Court of jurisdiction to pass upon the fairness and equitableness of any new proposed offer in so far as it may relate to the bonus to be paid to the underwriter, the subscription price at which the stock is to be offered to the stockholders, and whether under any offer of subscription the stockholders would be paying a price substantially higher than the valuation of the property fixed by the Court.

Further, by its action the Circuit Court vitiates the spirit of Chapter X by vesting in the stockholders the power to issue new securities, not subject to approval by the District Court, and not subject to registration with the Securities and Exchange Commission. Thus the stockholders would claim the benefit of exemption from the Securities Act of 1933 afforded by Chapter X, but without

being subject to the burden of court approval and review required by Chapter X.

Finally, the Circuit Court relegates to the stockholders the power to pass on the question of the feasibility of any new proposal. In the opinion of the Circuit Court, the District Court is enjoined from passing on the questions of whether the reorganized company under the proposed new plan would be able to continue in existence, whether it could pay the $1,000,000 annual charges on the first mortgage, whether the building could be kept up to date and rehabilitated to meet present-day competition, or whether under the proposed new plan there might result a foreclosure of the first mortgage in the foreseeable future. The Circuit Court said that this "was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage * * *."

Section 221 of the Bankruptcy Act provides:

> "Section 221. The judge shall confirm a plan if satisfied that * * *
> (2) the plan is fair and equitable, and feasible; * * *"

Section 222, relating to alterations or modifications of a confirmed plan of reorganization, provides in part as follows:

> "The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with."

Clearly, the District Court has jurisdiction over an altered plan under Section 222, the same as over an original plan under Section 221. In other words, the Court

may confirm an altered plan of reorganization only if satisfied that "the plan is fair and equitable, and feasible".

The decision by the Circuit Court of Appeals herein is apparently in conflict with the decisions of this Court in *Case* v. *Los Angeles Lumber Company*, 308 U. S. 106, and *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523. In the present case the Circuit Court has held that the financial ability of the reorganized company to fulfill its obligations after consummation of the proposed plan is a matter for determination exclusively by the stockholders. However, in *Case* v. *Los Angeles Lumber Company, supra*, at page 114, this Court said:

> "At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by § 77B (f) for confirmation of the plan has consented. It is clear from a reading of § 77B (f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders."

The conflict between these two decisions is clear. The determination by the Circuit Court in the instant case precludes the application of these rules by the reorganization court, strips it of power to consider fairness and feasibility of the proposed plan, and submits the question exclusively for determination by stockholders. This cannot be supported as having been the intention of Congress in the enactment of Chapter X.

(c) The Circuit Court did not have the right to deny petitioners' motions to dismiss the appeals pending in that Court upon the ground of mootness. The underwriting having expired, there was no new plan and no ques-

tion before the Circuit Court for determination, and the appeals should have been dismissed.

U. S. v. *Alaska Steamship Co.*, 253 U. S. 113;
Mills v. *Green*, 159 U. S. 651;
Security Life Ins. Co. v. *Prewitt*, 200 U. S. 446;
Richardson v. *McChesney*, 218 U. S. 487.
California v. *San Pablo & Tulare R. R.*, 149 U. S. 308.

In the last case, this Court said at page 314:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

(d) The Circuit Court did not have the power to hold the confirmed plan of reorganization in suspended animation while the stockholders were groping about for an underwriting that might support a new plan of reorganization.

Judicial Code, Section 128 (28 U. S. C. A. § 225).

In *United States* v. *Hamburg-American Co.*, 239 U. S. 466, this Court said at page 475:

> "But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to exercise a rule for controlling predicated future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314."

POINT V

The motion to vacate the order of confirmation was in effect a motion for a rehearing. An order denying a rehearing is not appealable.

While it is clear by the decisions of this Court that the District Court has power to grant motions for rehearings out of term, it is equally clear that neither a refusal to entertain such a motion, nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137 (1937); *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 149-50 (1942); *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145 (1906).

The same rule applies to motions to reopen, *Wragg* v. *Fed. Land Bank*, 317 U. S. 325, 327 (1943); motions to modify, *Old Colony Tr. Co.* v. *Kurn*, 138 F. 2d 394, 395 (C. C. A. 8th, 1943); motions to vacate, *Brown* v. *Thompson*, 150 F. 2d 171, 172 (C. C. A. 8th, 1945); and all like motions, however denominated.

The motions for a vacation of the order of confirmation were not based upon alleged mistake, gross inequity, fraud, or similar grounds; nor were said motions based on any allegation that the confirmed plan is not fair and equitable or not feasible. A new plan is desired merely because the respondents believe that such new plan may afford some additional benefits to some stockholders.

Such motions are clearly in the nature of motions for a rehearing on confirmation of the plan. As such, denial thereof is not appealable.

It is accordingly respectfully submitted that the writs of certiorari should be allowed by this Court.

Dated, March 27, 1947.

FRANK R. BRUCE,
Of Scribner & Miller,
Attorneys for Harry R. Amott, *et al.*,
Petitioners.

HENRY S. HOOKER,
Attorney for J. Donald Duncan,
Trustee, Petitioner.

Appendix

Sec. 24c. of the Bankruptcy Act: (11 U. S. C. A., § 47c)

The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals of the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

Sec. 240a of the Judicial Code: (28 U. S. C. A., § 347a)

Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) The provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) The plan is fair and equitable, and feasible;

(3) The proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) All payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

SEC. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) The debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) If the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) Distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a)

proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) Discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) Discharging the trustee, if any;

(3) Making such provisions by way of injunction or otherwise as may be equitable; and

(4) Closing the estate.

Federal Rules of Civil Procedure.

Rule 60. Relief from Judgment or Order.

(b) *Mistake; inadvertence; surprise; excusable neglect.* On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Sec. 128 of the Judicial Code (28 U. S. C. A. § 225):

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.